Office - Supreme Court, U.S.
FILED
MAR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-975

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATMON, YOUNG AND KIRK
PROFESSIONAL CORPORATION AND
HALLISON H. YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bellis v. *United States*, 417 U.S. 85 4

Fisher v. *United States*, 425 U.S. 391 2

Grand Jury Empaneled March 19, 1980, In re, 680 F.2d 327, aff'd in part and rev'd in part *sub nom. United States* v. *Doe*, No. 82-786 (Feb. 28, 1984) 3, 4

Reisman v. *Caplin*, 375 U.S. 440 6

Shillitani v. *United States*, 384 U.S. 364 6

United States v. *Beacon Federal Savings & Loan*, 718 F.2d 49 4

Constitution and statutes:

U.S. Const.:

Amend. IV 5

Amend. V 3, 4

Internal Revenue Code of 1954, 26 U.S.C. 7602 1

28 U.S.C. 1826 ..... 5, 6

28 U.S.C. 1826(a) 5

28 U.S.C. 1826(b) 5

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-975

PATMON, YOUNG AND KIRK
PROFESSIONAL CORPORATION AND
HALLISON H. YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' affirmance of the district court's orders enforcing IRS summonses and holding petitioners in contempt for refusing to comply.

1. Petitioner Patmon, Young and Kirk is a professional corporation engaged in the practice of law. Petitioner Young, an attorney, is a principal officer of the corporation. As part of an investigation to determine Young's correct tax liabilities for 1976-1977, the IRS, under authority of Section 7602 of the Internal Revenue Code (26 U.S.C.), issued summonses to him (individually and in his capacity as a corporate officer) and to the corporation. The summonses requested production of records concerning financial transactions between Young and the firm (Pet. App. 30a-37a).

Upon petitioners' refusal to comply, the government sought enforcement of the summonses in the United States District Court for the Eastern District of Michigan (Pet. App. 10a). Following a hearing, at which the IRS agent who issued the summonses was the only witness, the district court ordered the summonses enforced, as modified by a government concession (*id.* at 10a-15a).[1] Petitioners appealed; although stays pending appeal were denied both by the district court (*id.* at 16a-18a) and by the Sixth Circuit, petitioners persisted in refusing to comply with the enforcement orders. The government accordingly moved to have them held in contempt. The district court granted that motion, noting Young's "conflicting statements" on the stand (*id.* at 21a) and finding that petitioners had not shown adequate cause for failing to comply with the production order (*id.* at 19a-24a). The corporation was fined $500 per day until it purged itself of its contempt; fines totalling $8,000 have been levied against it to date (Pet. 20; Pet. App. 23a). Young was ordered incarcerated until he produced the records required by the summons directed to him in his capacity as corporate officer, and that order was stayed pending appeal (Pet. App. 21a-22a, 26a). The district court determined that Young had purged himself of his contempt with respect to the records required by the summons directed to him in his individual capacity (Pet. 19).

Petitioners filed eight separate appeals from the district court's orders enforcing the summonses, holding them in contempt, and imposing sanctions. Consolidating those

---

[1]The government acknowledged a clerical error in the summons directed to Young in his capacity as a corporate officer, withdrawing all but two paragraphs of that summons and thus requesting production only of corporate business records "which may properly be compelled over a [F]ifth [A]mendment claim even if they incriminate the custodian." Pet. App. 12a (citing *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976)).

appeals with four others filed by the corporation and its principals, the Sixth Circuit, in an unpublished order, affirmed the district court in all respects relevant here (Pet. App. 1a-4a).[2]

2. Petitioner Young contends (Pet. 27-38) that the order directing him to produce corporate business records violates his Fifth Amendment privilege against self-incrimination, asserting that the decision below conflicts with *In re Grand Jury Empaneled March 19, 1980*, 680 F.2d 327 (3d Cir. 1982), aff'd in part and rev'd in part *sub nom. United States* v. *Doe*, No. 82-786 (Feb. 28, 1984). In *Doe*, this Court considered the extent to which the Fifth Amendment privilege may be invoked by a sole proprietor in response to an IRS summons seeking production of the proprietorship's business records.

Petitioner's contention is frivolous. Young was served with two summonses. One sought production of personal and corporate business records and was addressed to him in his individual capacity (Pet. App. 30a-32a). The district court eventually ruled that Young had complied with that summons, thus purging himself of his contempt, and the court of appeals directed that the order enforcing that summons be dismissed. See page 2 & note 2, *supra*. There

---

[2]The court of appeals directed dismissal of the order enforcing the summons issued to Young in his individual capacity (6th Cir. No. 81-1190) in view of the district court's finding that Young had complied with that production order. See Pet. App. 3a; page 2, *supra*. The court of appeals retained jurisdiction of another appeal (6th Cir. No. 82-1827) because the record was incomplete (Pet. App. 4a). The court of appeals dismissed the remaining two appeals (6th Cir. Nos. 83-1337 and 83-1338), which challenged certain discovery orders of the district court, for lack of jurisdiction (Pet. App. 4a). The corporation and Frederick Patmon, one of its principals, have filed a separate petition for a writ of certiorari seeking review of the decision below in the latter respect. *Patmon, Young and Kirk Professional Corp. and Frederick Patmon* v. *United States*, No. 83-824.

is thus no longer a live controversy concerning Young's Fifth Amendment privilege to withhold personal business records, whether on "act of production" grounds (see Pet. 31-32, 36-37) or on any other ground. Compare *United States* v. *Doe*, slip op. 7-8.

The other summons sought production of the corporation's business records and was addressed to Young in his representative capacity, *i.e.*, in his capacity as a responsible corporate officer (Pet. App. 33a-34a). As the district court properly held (*id.* at 11a-12a), it is horn book Fifth Amendment law that "an individual cannot rely upon the privilege [against self-incrimination] to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Bellis* v. *United States*, 417 U.S. 85, 88 (1974) (cited in *United States* v. *Doe*, slip op. 3). Contrary to Young's repeated assertions (Pet. i, 28, 31, 34, 36), the summons in question was not issued to him as a "sole proprietor" and did not require production of "sole proprietorship" records; that aspect of *Doe* has no application here.

3. Petitioners contend (Pet. 39-44) that the government's petition to enforce the summonses was based on perjured affidavits and illegally obtained evidence. These allegations were not made in the district court and were presented for the first time to the court of appeals in a motion for remand to the trial judge, a motion that was filed after the court of appeals had heard oral argument (Pet. App. 42a-44a). Petitioners do not contend that the Sixth Circuit abused its discretion in declining to remand for consideration of these belated factual allegations, and, even if petitioners did so contend, it would not be a contention deserving this Court's review.[3]

---

[3]There is no merit to petitioners' assertion (Pet. 41-42) that the decision below conflicts with *United States* v. *Beacon Federal Savings & Loan*, 718 F.2d 49 (2d Cir. 1983). That case held that, where evidence

4. Petitioner Young contends (Pet. 45-51) that he was deprived of due process because the Sixth Circuit failed to decide his appeal from the contempt order within 30 days after his notice of appeal was filed. Young predicates this contention on 28 U.S.C. 1826, the "recalcitrant witness" statute. Section 1826(a) provides that, "[w]henever a witness in any proceeding before or ancillary to any court or grand jury" refuses to testify or produce records on court order, he may be summarily held in contempt and incarcerated for the life of the court proceeding or the term of the grand jury. Section 1826(b) provides that appeals from orders of confinement entered under Section 1826(a) "shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

Although Young's notice of appeal asserted (Pet. App. 28a) that he was appealing under 28 U.S.C. 1826, that Section plainly has no application to this summons enforcement proceeding, and its 30-day time limit is thus irrelevant. Young was held in contempt for refusing to obey an order enforcing an IRS summons, not for refusing to testify as a "witness" in any court or grand jury proceeding.[4] Orders enforcing summonses are final, appealable orders. *Reisman*

---

has concededly been seized in violation of the Fourth Amendment, a district court in a summons enforcement proceeding must consider whether the summons was based on the illegally-seized evidence, and, if so, whether it would be an abuse of the court's process to enforce the summons. In this case, by contrast, there has been no finding that any evidence was seized improperly, merely petitioners' unsubstantiated and belatedly-raised assertions to that effect.

[4]The purpose of Section 1826 is to permit speedy resolution of contempt orders emanating from ongoing trials or grand jury proceedings, so that a witness's recalcitrance will not unduly delay their completion. An order holding a summonsed party in contempt, by contrast, ends the entire proceeding, and there is thus no ongoing proceeding to be delayed pending appeal.

v. *Caplin*, 375 U.S. 440 (1964). A contempt citation consequent upon a summonsed party's refusal to comply is entered under the court's inherent power to enforce its orders (*Shillitani* v. *United States*, 384 U.S. 364 (1966)), not under 28 U.S.C. 1826.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

DOJ-1984-03